April 17, 2014

Via Electronic Submission

Melissa Jurgens, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Public Roundtable to Discuss Dodd-Frank End User Issues – Post Conference Comments

Dear Ms. Jurgens:

I. INTRODUCTION

The Edison Electric Institute ("EEI") and the Electric Power Supply Association ("EPSA") (hereinafter, "Joint Associations") appreciate the Commodity Futures Trading Commission's ("CFTC" or "Commission") decision to hold a public roundtable on April 2, 2014, to discuss end-user issues.

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members and more than 170 industry suppliers and related organizations as Associate members.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

Joint Associations appreciate the opportunity to submit comments on the three issues discussed at the roundtable. Joint Associations members are not financial entities; they are physical commodity market participants that rely on swaps primarily to hedge and mitigate their commercial risk. As such, regulations that make using swaps, the most effective risk-management tool for physical end-users, more costly will likely result in higher and more volatile energy prices for retail, commercial, and industrial customers.

II. COMMENTS

A. Obligations of end-users under Regulation 1.35

Joint Associations agree with the concerns expressed by the panelists regarding the obligations imposed by Commission Regulation 1.35 if an end user is classified as a member of a SEF or DCM. CFTC Regulation 1.35 imposes broad recordkeeping requirements for "members" and states in relevant part that:

> "(a)…Each futures commission merchant … and member of a designated contract market or swap execution facility shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity interests and related cash or forward transactions."

Becoming a participant of a SEF can explicitly grant an entity "trading privileges" on that SEF, which may cause an entity to be classified as a "member" of that SEF. This outcome places a significant, and in some cases cost prohibitive, recordkeeping burden on end users which has not been justified by the Commission. For example, as end-users, Joint Association members have not utilized many of the items included on the "original source documents" list (*e.g.*, trading cards, signature cards, street books, canceled checks). In addition, the recordkeeping rules in Parts 43, 45, and 46 of the Commodity Exchange Act do not require non-SDs/MSPs to keep records of all transactions that were unfilled or canceled. Since Joint Association members have not previously used or been required to use these items, requiring them to do so at this point by classifying them as a member of a SEF or DCM would be unduly burdensome. For example, the maintenance requirement for record of unfilled or canceled orders would require significant technical infrastructure for those entities that are not SDs, MSPs or a type intermediary registered with the CFTC and listed in CEA Section 4g(a). While these types of requirements might make sense for certain types of DCM and SEF members that act as intermediaries and/or handle customer money, they are not relevant to those entities not registered or required to be registered with the CFTC.

As such, Joint Associations respectfully requests that the Commission clarify that an entity that becomes a participant of a SEF solely to execute trades for its own account is not a "member" of that facility and is not subject to Regulation 1.35.

B. Appropriate Regulatory Treatment for Forward Contracts with Embedded Volumetric Optionality

As demonstrated by the lively discussion during the technical conference, the treatment of contracts with embedded volumetric optionality remains of concern to Joint Association members as well as to other end users. This is largely due to the manner in which electric utilities procure energy. Generally, utilities enter into a variety of contracts to serve their customers' needs. As indicated during the technical conference, the decision to use a particular contract can be based on a variety of factors. These factors should not be relevant because

forward contracts, even those with embedded optionality, that are intended to result in physical delivery of a commodity should be excluded from the swap definition under CEA Section 1a(47)(B)(ii). While Joint Associations believe that physical forwards with volumetric optionality should be excluded from the definition of swap, as an alternative, we offer comments on the Commission's 7-factor test.

The Commission's 7-factor test for physical forward contracts that have embedded optionality is overly restrictive and ambiguous. The seventh factor states:

> The exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity.

It is unclear what the term "outside of the control of the parties" means in practice. The exercise or non-exercise of volumetric optionality under a forward energy contract depends on a number of factors, including but not limited to, any or all of the following: (1) the level of demand as affected by weather or market conditions; (2) the amount of unexercised volume remaining under the contract; (3) the time of the change in the level of demand relative to delivery scheduling capabilities, (4) anticipated future weather conditions, (5) the delivery location under the contract relative to the demand location; (6) the price and availability of transportation capacity (e.g. pipeline capacity) to move natural gas; (7) the price of alternative sources of supply; (8) the availability of natural gas or electricity in the spot market; and/or (9) the remaining inventory of the commodity in storage.

Regulatory uncertainty increases transaction costs for Joint Association members and ultimately for consumers. The 7-factor test for physical forward contracts that have imbedded volumetric optionality is an area in which the Commission has created substantial uncertainty. End users have found the 7th factor unclear and difficult to implement which has resulted in uncertainty about how contracts should be treated. Counterparties to a transaction may view the same transaction differently with some viewing it as a forward, some as a trade option and some as a swap. Due to this ambiguity, some companies have defaulted to designating transactions as a trade option out of a desire to err on the side of caution especially since it is not clear whether the test is met if any entity has more than one contract alternative or supply choice. In some cases, this regulatory uncertainty has caused parties to walk away from transactions that would have served a legitimate commercial purpose. In other cases, parties are being asked to make vague representations that cannot be monitored in master agreements and, as a result, may lead to inadvertent breaches. The willingness of parties to agree and classify a given transaction as a trade option is further complicated by the inclusion of trade options in the position-limits proposed rule. In addition to causing uncertainty for market participants, the 7-factor test also affects the quality of data being reported to the Commission because one party to a transaction may report the same data differently than the other party to the transaction based on their differing interpretations of how a transaction should be treated under the 7-factor test.

As discussed during the technical conference, the core uncertainty in determining whether a transaction is a swap or a forward is not whether the physical commodity transaction includes some embedded volumetric optionality, but rather whether the transactions are intended

to be physically settled - the statutory standard that would exclude such transactions from the definition of "swap". The clarifications suggested below will help market participant address this question and provide regulatory certainty.

The CFTC styled the 7-factor test as "Interim Final Guidance" and requested public comment. Joint Associations request that the Commission act on the comments (many of which, including Joint Association's, requested elimination of the 7th factor), as well as the public input solicited as part of the April 2 roundtable, and publish final guidance.

In the alternative, if the CFTC is unwilling to eliminate the 7th factor altogether, Joint Associations would request that the Commission clarify that the 7th factor is satisfied:

- when the optionality – whether a put or a call – is intended to meet the commercial production or consumption requirements of the option owner's business, where these requirements can be reasonably affected by supply or demand conditions;

- regardless of whether the option owner arranges for multiple alternatives to address these requirements;

- including cases where business judgment is exercised in choosing among alternatives for which the value is driven primarily by external factors, including qualitative factors

This clarification would address the concerns with the 7th factor of the 7-factor test that were expressed during the technical conference. Participants also indicated that there is ambiguity regarding whether Factors 4 and 5 of the 7-factor test include both put and call optionality. Recognizing that, upon exercise of an option that calls for physical delivery of a commodity, the owner of the option is obligated to make delivery if the option is a put, but to take delivery if the option is a call, with the seller of the option bearing the opposite obligation in each instance, Joint Associations request clarification that the 4th and 5th factors are satisfied if:

- each party intends to satisfy its delivery obligations if the option is exercised, and

- the respective delivery obligations are consistent with the character of the embedded option as a put or a call**.**

A final rule or the instant suggested clarification will provide additional certainty to the market and help ensure that utilities and other commercial end users are able to continue to have a variety of forward contracts that are intended to be physically settled available to meet their commercial needs. The benefit of having these contracts was seen during the recent cold weather events in January and February of this year when the electric system was strained and flexibility as well as fuel choices and supply options were needed to meet demand.

C. Appropriate Regulatory Treatment for Purposes of the $25 million (special entity) *De Minimis* Threshold for Swap Dealing to Government-Owned Electric Utilities.

Many Joint Association members have longstanding commercial relationships with municipalities, power authorities and other special entities as part of their core electric generation and supply businesses. Joint Associations appreciate the issuance of the March 21, 2014 no-action letter on the *de-minimis* limit applicable to special entities and believe it is a big step in the right direction. The March 2014 no-action letter addresses material concerns that prevented some Joint Association members from engaging in swap transactions with these entities. Joint Associations are also supportive of the actions described by the Commission at the technical conference to formalize this no-action letter into a final rule.

Although the March 2014 no-action letter is a great improvement, some concerns remain. Notably, there remains some uncertainty as to when a person meets the definition of a "utility special entity". For example, it is not clear that a water or waste water utility, which may be a large natural gas and power user, would qualify as a "utility special entity." Joint Associations respectfully request that the Commission clarify that water and waste water utilities are included in the definition of a "utility special entity". Joint Associations also request that the Commission provide additional guidance clarifying that a person can in "good faith" rely on a representation from counterparty that it qualifies as a "utility special entity." This clarification will help ensure that Joint Association members do not have the burden of making that determination themselves and will not have to bear the significant risk of that determination being wrong (*i.e.*, the counterparty is not a "utility special entity" but is instead a special entity for which the $25 million threshold applies).

Finally, there are concerns with the general *de-minimis* threshold and the current transition from $8 Billion to $3 Billion in 2017 absent Commission action in the interim. This sudden, arbitrary drop, impacts the ability of Joint Association members to engage in long-term planning. Commodity prices are unstable and may vary considerably over time; the certainty of having a stable, consistent threshold will assist Joint Association's members in managing their businesses. The current proposed precipitous drop in the *de-minimis* threshold also may undercut the recent Commission no-action relief for swaps with utility special entities, as these swaps are now included in the general *de-minimis* threshold. Having the Commission provide additional certainty on this issue by clarifying that Commission action, with the opportunity for comment, will be taken prior to a reduction in the *de-minims level* will provide more certainty to the market.

III. CONCLUSION

Joint Associations appreciate the no-action letter and the forthcoming rulemaking on the special entity *de minimis* level. The action taken by the Commission will provide certainty to the market going forward. Similarly, Joint Associations request that the Commission provide guidance as requested herein on CFTC Regulation 1.35 and on the 7-factor test related to physical forward contracts with volumetric optionality. The clarifications requested herein will provide certainty to market participants while ensuring that the Commission's goal is met.

Thank you for the opportunity to provide comments and please contact the undersigned if you have any questions.

Respectfully Submitted,

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